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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/823,508	03/29/2001	Dennis Sunga Fernandez	078700-110103/US	9844
33717 7590 09/03/2008 GREENBERG TRAUIG LLP (L.A) 2450 COLORADO AVENUE, SUITE 400E INTELLECTUAL PROPERTY DEPARTMENT SANTA MONICA, CA 90404				
EXAMINER				
VO, TUNG T				
ART UNIT		PAPER NUMBER		
2621				
MAIL DATE		DELIVERY MODE		
09/03/2008		PAPER		

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DENNIS SUNGA FERNANDEZ and IRENE HU FERNANDEZ

Appeal 2008-1056
Application 09/823,508
Technology Center 2600

Decided: September 3, 2008

Before KENNETH W. HAIRSTON, JOHN A. JEFFERY, and R. EUGENE
VARNDELL, JR., *Administrative Patent Judges*.

VARNDELL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134 from the Examiner's rejection of claims 68-73. We have jurisdiction under 35 U.S.C. § 6(b). We reverse.

The invention claimed on appeal relates to a method including vendor and buyer processors for coupling a fixed vendor and a mobile buyer over a network (Org. Cl. 18). The invention includes determining the location of the mobile buyer, receiving a transaction message from the mobile buyer, and sending a transaction message to the mobile buyer identifying the fixed vendor (Org. Cl. 18). Among other things, the invention includes software automatically enabling video surveillance of the mobile buyer by the software having adaptive personal-image visual recognition ability automatically to provide computer-implemented visual recognition indication of a personal image of the mobile buyer (Spec 28-30).

Claim 68, which further illustrates the invention, follows:

68. In a network for coupling at least one fixed vendor processor to at least one mobile buyer processor, a method for transacting between vendor and buyer processors, the method comprising the steps of:
 determining a first location of a mobile buyer processor coupled to a network;
 receiving from the mobile buyer processor a first transaction message; and
 sending to the mobile buyer processor a second transaction message indicating a first fixed vendor processor proximately disposed to the first location, wherein the second transaction message is caused to be sent adaptively by software that matches a mobile buyer interest with a fixed vendor service or product by using past movement or location pattern of the mobile buyer, thereby facilitating local transaction efficiently between the mobile buyer and a nearby vendor, the second transaction message indicating real-time inventory and location-based pricing of service or product of interest to the mobile buyer available at the nearby vendor, the software providing access by the vendor processor to a video surveillance of the mobile buyer, *thereby automatically enabling such video surveillance of the mobile buyer to be performed automatically*

by the software having adaptive personal-image visual recognition ability automatically to provide computer-implemented visual recognition indication of a personal image of such mobile buyer, the software being partitioned modularly or layered hierarchically in a first core component comprising a database, and a next functional component comprising a transaction module, whereby one or more software agent functions cooperatively with or uses the first core or next functional component to enable extended or integrated network transaction between vendor and buyer processors.

(Emphasis added).

Hereinafter, the above-italicized limitation in independent claim 68, which is also required in independent claims 70 and 72, will be referred to as the “personal-image recognizing limitation.”

The Examiner relies on the following prior art references to show unpatentability:

Fan	US 5,959,577	Sep. 28, 1999
Hollenberg	US 6,091,956	Jul. 18, 2000
Kennedy, III	US 6,301,480	Oct. 9, 2001

The Final Rejection mailed on July 12, 2006 set forth the following rejections:

1. Claims 68, 70, and 72 stand rejected as being unpatentable under 35 U.S.C. § 103(a) over Fan in view of Hollenberg.
2. Claims 69, 71, and 73 stand rejected as being unpatentable under 35 U.S.C. 103(a) over Fan in view of Hollenberg in further view of Kennedy.

Rather than repeat the arguments of Appellants or the Examiner, we refer to the Appeal Brief filed on March 22, 2007 and the Examiner’s Answer mailed on May 29, 2007.

Appellants collectively argue independent claims 68, 70, and 72 together (Br. 9-11). Appellants also collectively argue dependent claims 69, 71, and 73 together (Br. 11-12). Arguments which Appellants could have made but did not make in their Appeal Brief have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii).

OPINION

In rejecting claims under 35 U.S.C. §103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness. *See In re Fine*, 837 F.2d 1071, 1073 (Fed. Cir. 1988). In so doing, the Examiner must make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

Claims 68, 70, and 72

The Examiner explains that Fan teaches all limitations in independent claims 68, 70, and 72 with the exception of the personal-image recognizing limitation. (Ans. 3-6). Appellants do not challenge these factual findings of the Examiner (Br. 9-12). The Examiner acknowledges that Fan does not teach or suggest the personal-image recognizing limitation in the claims on appeal (Ans. 6). The Examiner argues that Hollenberg teaches this limitation (Ans. 6, 7, 9, 10).

The issue on appeal is whether Hollenberg teaches the personal-image recognizing limitation in the claims on appeal, and if so, whether one of ordinary skill in the art would have found it obvious to include the personal-image recognizing limitation within the teachings of Fan.

The Examiner cites Hollenberg at column 8, lines 7-24; column 9, lines 15-23; and column 29, line 60 to column 30, line 3 as teaching the personal-image recognizing limitation in the claims on appeal (Ans. 6-7). However, we cannot find a factually sufficient disclosure of the personal-image recognizing limitation within Hollenberg. At best, Hollenberg proposes a situational information system where digital photographs or video recordings of traffic congestion and emergency-situation information could be transmitted with camera and communication capabilities (col. 8, ll. 7-24). However, this is not a teaching of the personal-image recognizing limitation required in the claims on appeal. In other words, Hollenberg does not teach or suggest “automatically enabling such video surveillance of the mobile buyer to be performed automatically by the software having adaptive personal-image visual recognition ability automatically to provide computer-implemented visual recognition indication of a personal image of such mobile buyer,” as required in the claims on appeal.

For these reasons, the Examiner has not established that the personal-image recognizing limitation claimed on appeal is known in the art. Therefore, the skilled artisan could not have found it obvious to include the personal-image recognizing limitation from Hollenberg in the method and structure proposed by Fan, because Hollenberg does not disclose or suggest this limitation.

In conclusion, the Examiner failed to establish a factual basis for the personal-image recognizing limitation on appeal, which is necessary to support the legal conclusion of obviousness. *Fine* at 1073. Therefore, we reverse the rejection of claims 68, 70, and 72 as

being unpatentable under 35 U.S.C. § 103(a) over Fan in view of Hollenberg.

Claims 69, 71, and 73

Claims 69, 71, and 73 respectively depend from claims 68, 70, and 72, and thereby include the personal-image recognizing limitation on appeal. Fan does not teach the personal-image recognizing limitation (Ans. 6). As discussed above, Hollenberg does not teach the personal-image recognizing limitation. The Examiner does not rely on Kennedy as teaching the personal-image recognizing limitation. Accordingly, for the same reasons set forth above for claims 68, 70, and 72, we reverse the rejection of claims 69, 71, and 73 as being unpatentable under 35 U.S.C. 103(a) over Fan in view of Hollenberg in further view of Kennedy.

CONCLUSION

The Examiner's decision rejecting claims 68, 70, and 72 as being unpatentable under 35 U.S.C. § 103(a) over Fan in view of Hollenberg is reversed. Similarly, the Examiner's decision rejecting claims 69, 71, and 73 as being unpatentable under 35 U.S.C. 103(a) over Fan in view of Hollenberg in further view of Kennedy is reversed.

REVERSED

Appeal 2008-1056
Application 09/823,508

APJ'S INITIALS

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